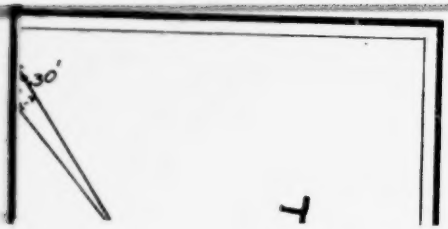
land and river lines of that date the course and current of the river can be traced, and, reserving the right to have same located with greater accuracy and certainty, complainant has had traced on said plat or map prepared by Col. Suter the river as it run in 1823, indicating same as the space between the red lines, shaded by yellow.

Attention is called to the fact that in 1874 the channel of commerce of the river (indicated by dotted lines) was between Island No. 37 and the main Tennessee shore. This was by reason of the accretions to the west of Dean's Island and the erosion into the opposite Tennessee shore, whereby the main channel had, in the course of time, been deflected through McKenzie Chute, *i. e.*, between said Island No. 37 and the main Tennessee shore.

With this explanation the said Suter map is here exhibited.

(Here follows map marked p. 4.)



FOLD OUT IS TOO LARGE TO BE FILMED

IV.

It will be observed that between the said river, flowing around Dean's Island, and the said river, flowing around Brandywine Bar, there is but a small neck of land, some few miles.

On the 7th day of March, 1876, the Mississippi river suddenly broke through and across this narrow neck or strip of land and made a new channel for the water.

The channel thus made is known as the Centennial Cut-off. Said cut-off was sudden and violent and a new channel for this immense river was washed out within twenty-four hours, farms and houses being swept away.

The waters gradually receded from the old and circuitous channel about Island No. 37 and Devil's Elbow, and that which had before been the bed of a large river became, in due course, comparatively dry land and now is suitable for cultivation or is covered with timber of considerable value.

V.

Since Tennessee and Arkansas were admitted into the Union many changes occurred, by accretion and erosion, in the course and current of the river prior to 1874 and 1876, some of which are as follows:

(1) Considerable portions of the eastern and southeastern parts of Dean's Island were washed away.

(2) The erosions into the Tennessee bank opposite the southern and western portions of Dean's Island

had caused said shore line to recede and Dean's Island to correspondingly increase by accretions, whereby Tennessee lost and Arkansas gained.

(3) The Arkansas shore opposite the northern or upper end of Island No. 37 had considerably eroded, while Island No. 37 was correspondingly enlarged by accretions, whereby Arkansas lost and Tennessee gained.

(4) At a point marked on the plat above exhibited—"Plum Island No. 38"—the eroding was into the Tennessee shore, whereby the Arkansas territory was enlarged, by accretion.

(5) Between Devil's Elbow and Brandywine Point the Arkansas shore eroded and corresponding accretions were made to the territory of the State of Tennessee.

VI.

Prior to the Centennial Cut-off of 1876 the changes in the river at the *locus in quo* were gradual and imperceptible and the shifting of the middle of the main channel of the Mississippi river was gradual and imperceptible, and the boundary line between the States of Tennessee and Arkansas followed said gradual and imperceptible changes.

The said cut-off, whereby suddenly the river made a new bed, was an avulsion, and left the boundary line between said States exactly as it was just preceding said avulsion, to wit, the middle of the main channel of the Mississippi river as it then flowed.

Said line has never been traced or run, and, with the lapse of time, the difficulty of accurately locating and running said line is increased, wherefore it is important to the affected States that same be now run.

VII.

The Mississippi river, a navigable stream, constituted the boundary between the States of Tennessee and Arkansas, and the middle of the main channel of the stream marked the true boundary between said States, and said boundary line shifted and changed with the gradual and imperceptible shiftings and changes of said river until said line became fixed by the happening of the avulsion above mentioned, and the said line, as it existed at a time immediately prior to said avulsion, is the true boundary between the said States.

Notwithstanding this, and notwithstanding that the legislature of Tennessee has recognized that "the true boundary between Tennessee and Arkansas is still the center of the main channel of said river, as it then flowed" (Ch. 516, acts of Tennessee, 1907), the State of Tennessee is now claiming that the boundary line between said States is a line equidistant from the visible, defined, and substantially established banks within which the water flowed in the year 1823, wholly ignoring and disregarding the gradual and imperceptible changes wrought up to the time of the said Centennial Cut-off, in 1876, by which gradual and imper-

ceptible changes each of the said States lost much territory and each gained much territory.

Said claim is being so made in a civil action by the State of Tennessee against a private citizen of the State of Arkansas, to which the State of Arkansas is no party, as is now fully shown in the next paragraph hereof.

VIII.

On the 14th day of December, 1903, the State of Tennessee instituted, in the Chancery Court of Tipton County, Tennessee, an action against W. A. Cissna, who claims to own Dean's Island and all accretions thereto, in the State of Arkansas, and The Muncie Pulp Co., which purchased the timber on said lands of said Cissna. By said action the State of Tennessee sought to recover possession of a considerable tract of land, lying on the Arkansas side of the middle of the main channel of the Mississippi river as it run in 1876, immediately prior to the Centennial Cut-off, as well as the value of much timber cut therefrom.

The defendants in said action pleaded that all land claimed by said Cissna and all timber sold by him to the Muncie Pulp Co. and by it cut and removed came from Dean's Island and accretions thereto, and said defendants disclaimed title to or interest in any lands or timber in the State of Tennessee.

On the issues made by the pleadings much proof was taken and the lower court dismissed the suit of the State of Tennessee, which appealed the case to the Su-

preme Court of the State of Tennessee. At the September term, 1907, of said court the judgment or decree of the lower court was reversed and the Supreme Court of Tennessee held that the boundary between the States of Tennessee and Arkanses was a line equidistant between the defined banks of the Mississippi river as it run in 1823, and directed that the cause be remanded to the lower court to enable the complainant in that action (the State of Tennessee) to so amend its complaint as to claim title to land to that point and prosecute the cause in accordance with the opinion of the said court, reported in the official reports of said State (119 Tennessee, 47).

While the decision of the court in said case went beyond any issue before said court, and while the State of Arkansas could not be bound thereby, the said holding, and the subsequent amendment by the State of Tennessee of its complaint, as suggested by the court, and the pendency and prosecution of said suit at this time in the lower court make it necessary that, in the protection of its citizens and sovereignty, the State of Arkansas institute this suit, that the true limit of the rightful jurisdiction of each State should be properly and lawfully determined.

Wherefore, being without remedy on the law side of this court, the State of Arkansas prays that the State of Tennessee be made party defendant to this bill, and that a subpœna be issued and served upon the proper officers of said State and that it be required to answer the allegations hereof, but not on oath.

And it is prayed that your Honors, by proper orders

and decrees, established the true boundary line between the State of Arkansas and the State of Tennessee at a line running from the head of Dean's Island Arkansas, with the sinuosities of the Mississippi river as it run in 1876, just prior to the Centennial Cut-off, to the point where said line comes to follow the middle of the main channel as it run at said date; that the rights, jurisdiction, and sovereignty of the State of Arkansas to all the land and territory lying within the said western line of the State of Arkansas so established be confirmed and established by the decree of this court.

And to the end that the said line may be definitely located and fixed by the only court having jurisdiction to do so, it is prayed that a boundary commission be appointed to ascertain and designate said boundary line between the said States of Arkansas and Tennessee, and that such boundary commission be required to make the proper examination and to delineate on maps prepared for that purpose the true line as determined by this court.

And that your Honors grant the State of Arkansas such other and further and general relief to which it may be entitled.

THE STATE OF ARKANSAS,
By HAL L. NORWOOD,
Attorney General.

HAL L. NORWOOD,
CARUTHERS EWING,
Solicitors for the State of Arkansas.

FILE COPY.

FILED.
APR 12 1912
JAMES H. McKENNE
CLE

THE

Supreme Court of the United States

OCTOBER TERM, 1911

THE STATE OF ARKANSAS,
Complainant.

vs.

No. 7 Original,

THE STATE OF TENNESSEE,
Defendant.

Brief for the State of Arkansas on the Demurrer of the State of Tennessee to the Bill of Complaint.

HAL L. NORWOOD,
Attorney-General of Arkansas.

CARUTHERS EWING,
Solicitors for Complainant.

E. C. TOOF & CO., PRINTERS, MEMPHIS.

THE

Supreme Court of the United States

OCTOBER TERM, 1911.

THE STATE OF ARKANSAS, Complainant,

vs. No. 8, Original.

THE STATE OF TENNESSEE, Defendant.

BRIEF FOR THE STATE OF ARKANSAS ON THE DEMURRER OF THE STATE OF TENNESSEE TO THE BILL OF COMPLAINT.

The bill filed in this case by the State of Arkansas sets out the ceding by North Carolina on February 25th, 1790, to the United States of certain territory (*Volume I., American State Papers, Public Land,* p. 17), and the western boundary of the ceded property was described as "the middle of the Mississippi River."

It was averred that by Chapter XLVII., Acts of Congress, June 1st, 1796, Tennessee was admitted into the Union and the territory embraced within said State was described as "the whole of the territory ceded to the United States by the State of North Carolina."

1 U. S. Stat. at Large, p. 491.

On June 23d, 1836, by Chapter 120 of the Acts of 1836, the State of Arkansas was admitted into the Union and the description of her eastern boundary, in so far as it relates to this controversy, is—

> "the middle of the main channel of the Mississippi River," etc.

The course of the Mississippi River as it ran at the earliest time of which there is accurate record, was set out in the bill and the material changes which had been made in the course of the river by the shifting channel and thereafter by what is known as the Centennial Cut-Off, (which occurred March 7th, 1876), were explained and exhibited to the Court.

The various changes that had been wrought by accretion and erosion were enumerated in paragraph V. of the bill and the claim made on behalf of the State of Arkansas that with the gradual and imperceptible shiftings of the middle of the Mississippi River the boundary line between that State and the State of Tennessee changed and shifted accordingly, but when the "Cut-Off" took place, that is, at the time of the avulsion, the line became fixed as and at the middle of the river immediately preceding said avulsion.

It was set out in the bill that said line had never been traced or run, and as time passed and natural conditions were altered the difficulty of running that line was increased and the claim of the State of Tennessee that the boundary line between said States was at a point equidistant from the visible defined banks of 1823, prior to the many and manifold

changes through the processes of accretion and erosion, was set up and legislative enactment and judicial proceedings were pointed out evincing this claim of the State of Tennessee.

The bill further averred:

> "While the decision of the court in said case (State of Tenn. v. Muncie Pulp Co.) went beyond any issue before said court, and while the State of Arkansas could not be bound thereby, the said holding and the subsequent amendment by the State of Tennessee of its complaint, as suggested by the court, and the pendency and prosecution of said suit at this time in the lower court make it necessary that, in the protection of its citizens and sovereignty, the State of Arkansas institute this suit, that the true limit of the rightful jurisdiction of each State should be properly and lawfully determined."

It might be well to somewhat elaborate the history of this controversy between Tennessee, on the one part, and citizens of Arkansas, on the other part, which resulted in the State of Arkansas instituting this action.

In 1900 one H. W. Stockley, a citizen of Tennessee, instituted an action of ejectment against W. A. Cissna, a citizen of Arkansas, to recover twelve hundred acres of land, which said Stockley claimed was in Tipton County, Tennessee. The plaintiff failed in that action, but the record, as made up, justified the Circuit Court of Appeals, Sixth Circuit, in treating the land as within and belonging to the State of Tennessee. A full review of the conditions, as shown by the record in that particular case, will be found in

the opinion of Mr. Justice Lurton, reported in *119 Fed. Rep. 812.*[1]

This case was decided in November, 1902, and at the following session of the Tennessee Legislature an act was passed, in the preamble of which appears the following recital:

> "Whereas, the western boundary of the State of Tennessee, prior to the year 1876, was the center of the main channel of the Mississippi River. And the true boundary between Tennessee and Arkansas is still the center of the channel of the Mississippi as it then flowed, but by a sudden and very remarkable change in the channel in 1876 a part of Tennessee was thrown to the western side of the river, and today nearly an entire civil district is on the western or Arkansas side of the Mississippi. Prior and up to 1876 the channel of the Mississippi River at a point some thirty or forty miles above the city of Memphis, in Tipton County, made a bend embracing some fifteen or twenty miles in the circuit, and returned to a point some two miles from where the circuit began. This bend was known as the 'Devil's Elbow,' and the center of this channel was the recognized line between Tennessee and Arkansas. A peninsula was thus formed, separated from Arkansas by the Mississippi River and connected with the mainland on the Tennessee side by a narrow strip or neck.
>
> In 1876 the Mississippi River, by a sudden avulsion or change of its channel, cut across this neck at what is called 'Centennial Cut-Off' and

1. Arkansas was not a party to that proceeding and will show, at the proper time, that the facts are not as they were made to appear in that case, but are as averred in the bill in the case at bar.

abandoned its former channel around 'Devil's Elbow,' thus throwing a large body of land, a part of the territory of Tennessee, west of the present channel of the Mississippi. In a few years after this change was made the water entirely disappeared from the old and abandoned channel, so that what was formerly the center of the Mississippi River and the boundary between Tennessee and Arkansas, is now dry land, a large part of which has grown up in willows and cottonwood trees.

Under well known principles of law, recognized by the highest authorities, this avulsion or sudden change in the channel of the Mississippi River did not operate to change the boundary line between Tennessee and Arkansas. That boundary is still the center of the old and abandoned channel of the Mississippi River, but that line has never been marked and located since the channel was abandoned and became dry land."

The purpose of this enactment was to empower the Governor of Tennessee to appoint a commission to act with a like commission of the State of Arkansas—

"to survey and locate the line between low water mark of the said abandoned channel of the Mississippi River around 'Devil's Elbow' and any other points surveyed and located, and the adjoining land owners on the Tennessee side of the river; to estimate the number of acres of land lying between the said low water mark, lying so located and the line between the State of Tennessee and Arkansas herein authorized to be surveyed and located, and to examine and consider the character and value of the said lands."

Chapter 420, Acts of Tennessee, 1903.

Thus, by the Legislature of Tennessee is there a certification that such confusion exists with respect to the exact location of this boundary line as would justify either State, having regard for its territorial extent and the preservation of its sovereignty, to take necessary steps to have this line definitely established.

The Legislature of Arkansas passed a like act, but the Governor vetoed it.

It is of no importance why he vetoed it and the reasons for his veto are not preserved of record in the State of Arkansas.

Later developments in Tennessee produced such a controversy that it was deemed important and essential that this bill be filed to avoid a conflict between the courts of the two States.

If, in the proceeding which will be hereafter noticed, Tennessee should undertake to get possession of land which is claimed to be in the State of Arkansas and should send her officers on that land to eject the citizens of Arkansas therefrom, the only redress such citizens of Arkansas would or could have would be an appeal to the Arkansas courts for injunctive process, thus making between the officers of the two States a conflict unseemly in character and one that should by all means be avoided. It would make a conflict that it is regretted that the learned Attorney General of the State of Tennessee feels his duty requires him to promote or provoke.

After legislative efforts at the settlement of this boundary line had resulted in failure, as above indicated, the State of Tennessee instituted an action against the Muncie Pulp Co., *et al.,* to recover a portion of this land which complainant claims is in the State of Arkansas. The Chancellor dismissed the bill and held that the land was in Arkansas. The State of Tennessee appealed from that decision to the Supreme Court of Tennessee, and, at a special September term, 1907, the Supreme Court of Tennessee undertook to fix the boundary line between Tennessee and Arkansas, not in accordance with the claim that was made by the State of Tennessee in the bill which it filed, and remanded the cause to the lower court for further proceedings.

When the State of Tennessee instituted its action against the Muncie Pulp Co., et al., it only claimed title to the middle of the river as of the date of the cut-off or avulsion, to-wit, 1876. This insistence or claim was in accord with Tennessee's legislative assertion in 1903 and was in accord with the law as announced by this Court in many cases and practically accepted as the law everywhere.

The proof developed in that case, under this claim made by the State of Tennessee, that if the line were to be run as and according to the middle of the river of 1876, the date of the "cut-off," the State of Tennessee would recover no land and therefore, in the Supreme Court of Tennessee it was necessary to change the insistence of the State so as to assert that all the shiftings and changes of the river prior

to the avulsion should be undone and thus have established as the line between the two States the middle of the river as it ran in 1823. The object was to fix the line as the river ran before these changes had taken place and not as it ran in 1876, when the avulsion took place. The desire of the Attorney General of Tennessee was approved by the Supreme Court of that State, and in the opinion of the Court it was said:

> "It is said that complainant only sued for the land lying west of the center of the channel as it was in 1876, and therefore cannot recover to the center of the channel of 1823. This is true; but this case must be remanded, for a hearing upon the answers of the defendants, and, if it is desired, the bill may then be amended so as to make the proper averments to entitle her to recover under the principles here settled."
>
> *State of Tennessee v. Muncie Pulp Co., et al.*, 119 Tenn. 47, 133-134.

The Supreme Court of Tennessee decided in said case much that was not involved, but which, if involved, was material to the rights of the State of Arkansas.

Principles were announced in that case which, as we submit, with all deference to that learned Court, were in direct and irreconcilable conflict with each other, as will be later shown.

At page 103 of the opinion, as reported, the Court said:

> "The channels of the rivers and other streams and bodies of water may and do

become changed and their physical location altered by the forces of nature operating upon their shores or banks. When the change is made insensibly, by gradual and imperceptible washing away of one shore and the formation in like manner upon the other shore, it is said to be 'by erosion and accretion.' "

And at page 104:

"Where the boundary lines between individuals, as well as States and nations, are marked by streams, and the location of the stream is altered by erosion and accretion, it continues to be the boundary line; but where the alteration occurs as the result of an avulsion, no change is made, but the limits of the private estates or national territory and jurisdiction remain as before."

And at page 109:

"We have, in the light of these authorities, no hesitancy in holding that the change made in its channel by the Mississippi River in 1876 at Centennial Cut-Off was an avulsion, and the limits of Tennessee and Arkansas, their respective rights in the abandoned channel, and those of individuals who owned lands lying and abutting upon it, all remained as they were before the formation of the new channel."

So that the Supreme Court of Tennessee announced a correct principle, to-wit: That the middle of the channel, abandoned as the result of an avulsion, was the true boundary line between the States of Tennessee and Arkansas and that prior to this avulsion the boundary line had shifted with the gradual and imperceptible shiftings of the river.

The Court, at page 59, as well as at page 114 of the cited case, found as a fact that prior to the avulsion the Mississippi River had increased in width from a little less than one mile to a mile and a quarter or a mile and a half, and as the Tennessee shore was the receding shore, and as the Arkansas bank was the fixed bank, the line had shifted toward the Tennessee side and, therefore, the territorial limits of Arkansas were by these insensible and imperceptible shiftings of the river largely increased.

And the Court, at page 103, made the following very proper announcement:

> "The change made by the river March 7, 1876, in its channel, did not alter the boundary line separating complainant and Arkansas, or affect the respective rights of those States, or those of the owners of land abutting upon the river in the abandoned channel or bed."

This would have resulted in a dismissal of the action brought by the State of Tennessee but for the subsequent announcement of what we respectfully submit is an erroneous legal principle and, as we read and understand it, one in conflict with that just noted.

At pages 132 and 133 the Court, dealing with the effect of the avulsion, said:

> "The effect of it was to press back the line of the State, as it ran at low water mark, to the eastern boundary line along the river bank to the grants it had made, so as to restore the grantees and their assigns to their property, and at the same time to press back to the center of

> the old channel, as it ran previous to the submergence of those grants, the line between the two States, so as to restore to Tennessee what it held before the erosions upon its banks."

So that the Court, after announcing that the avulsion "*did not alter the boundary line separating complainant and Arkansas,*" proceeded to say that "*the effect of it was to press back the line of the State,*" (Tennessee).

A thing cannot possibly be pressed back without being altered. Any line which is pressed back from one place to another and different place is necessarily altered.

It was this decision and subsequent action thereunder which made it necessary for this bill to be filed by the State of Arkansas.

And the Supreme Court of Tennessee recognized that it was dealing with the rights of the State of Arkansas, not a party to that proceeding, and there is no way known to the law that it could have been a party to that proceeding.

At page 58 of the opinion of the Court is the following statement:

> "The location of the boundary line between Tennessee and Arkansas, and the right of the former to recover the lands in question, are practically the same question, and will therefore be considered together."

And at page 70 it was said:

> "This is an important question, affecting the States of Tennessee and Arkansas in their sov-

ereign capacity, and their jurisdiction along this entire joint boundary line."

Therefore, we have the legislative declaration that it is necessary and proper to locate the line between the two States, (Legislative Enactments of 1903, *supra*), and we have the declaration of the Supreme Court of Tennessee that it has been proposing to judicially determine the location of the boundary line and that this question affects "the States of Tennessee and Arkansas in their sovereign capacity."

This, in brief, is a history of matters that made proper the filing of this bill and brings us to a discussion of the specific grounds of demurrer filed by the State of Tennessee..

I.

The learned Attorney General of the State of Tennessee states that this is not a "controversy" between the two States which, without more, gives this Court jurisdiction.

We have undertaken to show that there is a serious controversy which could easily degenerate into an unseemly wrangle between these two States, and the point made by the Attorney General of the State of Tennessee is that this is not "an appropriate case," (whatever that may mean), for the exercise of the jurisdiction of this Court with respect to fixing the boundary line between States.

As we understand the proposition advanced by the defendant's learned Attorney General, it is that set-

tling a controversy as to the boundary line between States must be incidental to some other proceeding rather than the object and purpose of the proceeding.

He phrases his contention as follows:

> "In other words, this court of equity will determine a question of boundary when it has jurisdiction of the case upon some well-recognized ground of equitable jurisdiction—not because the *dispute over the boundary* or some uncertainty or controversy in reference thereto, *per se*, gives this court jurisdiction, but for the reason that when it takes jurisdiction of the case upon some ground of equitable relief, such as fraud, multiplicity of suits, or some equity superinduced by the act of the parties, it will, as incidental to such jurisdiction, determine a disputed or controverted boundary."

Exactly in what way one sovereign State is to commit a "fraud" on the other, or bring or be the victim of a "multiplicity of suits," or even in what forum or with respect to what matter the many suits are to be brought or threatened, so that a boundary line could be here established, is not revealed to less imaginative persons by the defendant's learned Attorney General.

But further illustrating his idea is the statement at page 31 of his brief, as follows:

> "In writing the clause under consideration into the Federal compact designed 'to form a more perfect union, to establish justice and insure domestic tranquillity,' it was the intention

> of its framers to substitute, for the field of battle and the clash of arms, the orderly processes, the calm investigation and impartial judgment of this Supreme Court of the Union, as the final —*the dernier*—resort and sole arbiter for the settlement of those questions of sovereignty, in respect of which the States, after exhausting other efforts to reach an agreement, might find themselves in direct conflict."

We have by this proceeding invoked "the calm investigation and impartial judgment of the Supreme Court of the Union."

Carried to its last analysis, however, the argument of the learned Attorney General of the defendant is that there must be some preparation for war, some drawing of a gun as it were, some marshalling of the hosts, or, perhaps, a little squabble might do, before this Court has jurisdiction of a controversy as to the boundary between two States.

It is believed that it was never intended by the framers of the Constitution that this Court's jurisdiction should not be invoked by a State to settle a disputed boundary with another State, only and unless the mob was gathering or the officers or citizens of one State were performing in disorderly manner, threatening the public peace, wagging war's clamorous tongue and preparing "for the field of battle and the clash of arms."

The learned Attorney General of the State of Tennessee cites many cases to sustain the proposition that courts will not take cognizance of a proceeding to settle a dispute as to boundary between

individuals merely because a land owner is in doubt as to the extent of his ownership of land and with this proposition we have no concern.

We have, however, some interest in the fact that the learned Attorney General for the State, discussing this proposition and dealing with *Rhode Island v. Massachusetts,* 12 Pet. 654, quotes and italicizes the following language of the Court:

> "No court acts differently in deciding on boundary between States than on lines between separate tracts of land."

The above is but a part of a sentence and it was ruthlessly snatched from its context and denuded of its import.

What the Court did say in that connection is as follows:

> "No courts act differently in deciding on boundary between States than on lines between separate tracts of land; if there is uncertainty where the line is, if there is a confusion of boundaries by the nature of interlocking grants, the obliteration of marks, the intermixing of possession under different proprietors, the effects of accident, fraud or time, or their kindred causes, it is a case appropriate to equity. An issue at law is directed, a commission of boundary awarded; or, if the courts are satisfied without either, they decree what and where the boundary of a farm, a manor, province or a State, is and shall be."

The above is entirely sound and is but a mere announcement of the well understood proposition that

the same rules of law which govern the rights of adjoining property holders, in so far as the location and designation of boundary lines is concerned, govern and settle the location of boundary lines between sovereign States.

It is insisted for the defendant that the bill fails to show "a controversy, within the meaning of the constitution, between the States of Tennessee and Arkansas," and it is said in the brief of the learned Attorney General of the State of Tennessee that the meaning of the word "controversy" is involved in obscurity and shrouded in some mystery.

We do not so understand it.

By Section 2 of Article III. of the Constitution of the United States, jurisdiction was conferred upon this Court to hear and determine "controversies between two or more States."

The word "controversy" is in the Universal Dictionary of the English language defined as "a lawsuit."

In the Scriptures the word "controversy" was used as synonymous with a lawsuit.

II. Samuel, XV., 2.

In *Osborn v. Bank*, 9 Wheat. 738, Mr. Chief Justice Marshall, speaking of Article III. of the Constitution, which declares that the judicial power shall extend to all cases in law and equity arising under the Constitution, etc., said:

> "This clause enables the judicial department to receive jurisdiction to the full extent of the

> Constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws and treaties of the United States."

In *Rhode Island v. State of Massachusetts*, 12 Pet. 654, the Court said of that action:

> "That it is a controversy between two States cannot be denied; and though the Constitution does not in terms extend the judicial power to all controversies between two or more States, yet in terms excludes none, whatever may be their true nature or subject."

In *Prigg v. Com. of Pa.*, 16 Pet. 538, Mr. Justice Story, construing the constitutional provision, said:

> "It is plain, then, that where a claim is made, by the owner, out of possession, for the delivery of a slave, it must be made, if at all, against some other person; and inasmuch as the right is a right of property capable of being recognized and asserted by proceedings before a court of justice, between parties adverse to each other, it constitutes, in the strictest sense, a controversy between the parties, and a case 'arising under the Constitution' of the United States, within the express delegation of judicial power given by that instrument."

In *Gaines v. Fuentes*, 92 U. S. 10, the word "controversy" was assumed to mean nothing more nor less than a lawsuit:

> "And a controversy was involved in the sense of the statute whenever any property or claim of the parties, capable of pecuniary estimation, was the subject of the litigation, and was presented by the pleadings for judicial determination."

In *Barney v. Latham*, 103 U. S. 205, the Court treated the word "controversy" as synonymous with lawsuit.

In *Smith v. Adams*, 130 U. S. 167, Mr. Justice Field said that when the law of a territory left the designation of a county site to the voters of the county and provided for the contest of the election, the consequent lawsuit became "a case or controversy," and said:

> "This has been substantially the meaning given to the terms 'cases and controversies,' used in the judicial article of the Constitution defining the limits of the judicial power of the United States. By those terms are intended the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress or punishment of wrongs. *Whenever the claim or contention of a party takes such a form that the judicial power is capable of acting upon it, then it has become a case or controversy.*"

And so in *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, it was said:

"What is a case or controversy to which, under the Constitution, the judicial power of the United States extends? Referring to the clause of that instrument which extends the judicial power of the United States to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or that shall be made under their authority, this court, speaking by *Chief Justice* Marshall, has said: 'This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws and treaties of the United States when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws and treaties of the United States.' *Osborn v. Bank of United States,* 22 U. S., 9 Wheat. 738, 819 (6:204, 233). And in *Den v. Hoboken Land and Imp. Co.,* 59 U. S., 18 How. 272, 284 (15:372, 377), *Mr. Justice* Curtis, after observing that Congress cannot withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty, nor on the other hand, bring under judicial power a matter which, from its nature, is not a subject for judicial determination, said: 'At the same time there are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them and which are susceptible of judicial determination, but which Con-

> gress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.' So in *Smith v. Adams,* 130 U. S. 173 (32:897), *Mr. Justice* Field, speaking for the court, said that the terms 'cases' and 'controversies' in the Constitution embraced 'the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress or punishment of wrongs.' "

In *Louisiana v. Texas,* 176 U. S. 1, the Court construed the constitutional provision with respect to its jurisdiction of controversies between States, as it related to the enforcement of rules and regulations established by a health officer which the State had not authorized or confirmed, whereby an embargo was put on commerce from another State, etc. The court held that the mere maladministration of the laws of a State, to the injury of the citizens of a city in another State, did not constitute such a controversy between the States as was contemplated by the Constitution, and in the opinion of the court it was said by Mr. Chief Justice Fuller:

> "In our judgment this bill does not set up facts which show that the State of Texas has so authorized or confirmed the alleged action of her health officer as to make it her own, or from which it necessarily follows that the two States are in controversy within the meaning of the Constitution."

Mr. Justice Harlan, in a concurring opinion, said: "The case involves no property interest of that State," referring to Louisiana.

Mr. Justice Brown said in a concurring opinion:

> "The controversy is not one in which the citizens of Louisiana generally can be assumed to be interested, but only the citizens of New Orleans, and it therefore seems to me that the State is not the proper party complainant."

In other words, the "controversy" was not *between the States* in the case just mentioned, but the State of Louisiana undertook, on behalf of the citizens of one city, to invoke the original jurisdiction of this Honorable Court, not with respect to its sovereignty or territory and against the aggressions of a sister State. In other words, it was not a lawsuit between the States as sovereign powers.

A "controversy" arises between States when one State is asserting the right to land which is in possession of another State and which both claim to own.

In this case we have the State of Tennessee, in its own courts, avowedly undertaking to get land which the Supreme Court of Tennessee says involves the settlement of the boundary line between Tennessee and Arkansas.

We have Tennessee claiming certain land and trying to get it on the ground that a certain line constitutes the boundary between the States.

We have Arkansas denying that the boundary line is as claimed by Tennessee, and it is here invoking

the jurisdiction of this Court to settle the boundary line between the two States; that is, determine which State owns the land claimed by both.

In this sense it is as though two individuals were claiming a certain right or property and as a result a controversy exists between them and this controversy, in the terminology of the law, means an action or lawsuit.

In *Sheldon v. K. N. L. P. Co.*, 1 Fed. 789, the Court construed the second section of the act of March 3, 1875, providing for the removal of causes from a State court to the Federal court and the word "controversy" was treated as synonymous with lawsuit, that is to say, a controversy between citizens of different States existed whenever in a judicial proceeding one asserted a right against the other.

To the same effect is—

Bybee v. Hawkett, 5 Fed. 1.

Boyd v. Gill, 19 Fed. 145:

"The controversy is the claim in form and substance as it is presented for determination."

Gudger v. W. N. C. R. Co., 21 Fed. 81:

"To constitute a controversy in an action at law there must be an allegation on one side and a denial on the other, making an issue of fact or of law."

Fiske v. Henarie, 32 Fed. 417:

"A controversy in the contemplation of the Constitution is but a dispute concerning rights or wrongs cognizable by law and which may, therefore, be the subject of an action or involved therein."

King v. McLean Asylum, etc., 64 Fed. 331.
Snow v. Smith, 88 Fed. 657:

"The remaining question is whether there is any other controversy in this suit. I think there is. It concerns the title to the land which was mortgaged to secure the payment of the notes in question."

U. S., etc., v. Henderlong, 102 Fed. 2.
Burleigh et al. v. Foreman, 125 Fed. 217.

II.

It is said, however, that this Court should not take jurisdiction of this controversy between Tennessee and Arkansas, with respect to the location of the boundary line between said States, "because complainant is in possession of the premises."

If there is any force in this suggestion, it must be the law that a State in possession of land and asserting jurisdiction over the same can maintain no action against a sister State, claiming the land and undertaking to get it, without first surrendering possession to what may be the wrongful claimant.

The learned Attorney General for the State of Tennessee confuses this proceeding between sovereign powers, brought in a forum ordained by the Constitution for the determination of the question involved, with controversies between individuals over real estate, in the nature of forcible entry and detainer or ejectment. The conduct of the State of Tennessee in prosecuting the action against the Muncie Pulp Company et al. (119 Tenn. 47), though it was said by the Supreme Court of Tennessee to in-

volve the question of the location of the boundary line between Arkansas and Tennessee, indicates that it is the conception of the learned Attorney General of the State of Tennessee that this controversy as to the boundary line between the States should be dealt with as though one individual were undertaking to recover land from another.

III.

In the brief for the State of Tennessee it is said:

> "The bill shows that the lands claimed by the complainant are either in her own possession or that of W. A. Cissna claiming under her, and that so far from defendant being in possession thereof, she is prosecuting in an orderly way an action (Printed Bill, p. 8) to recover the same."

With the State of Arkansas in possession of land and with the State of Tennessee undertaking "to recover the same," it must be obvious to the Court that there is a "controversy" between the two States as to whether this land is in the one State or the other, and it was surely this character of "controversy" that the framers of the Constitution intended should be submitted to "the calm investigation and impartial judgment" of this Honorable Court.

It is said on behalf of the State of Tennessee that the complainant does not aver in the bill "any effort whatever at the accommodation of any difference between herself and the defendant."

We are aware of no rule of law which requires negotiation for a compromise as a condition precedent

to the right to sue. If such is the law, however, the futile efforts of the legislatures of the two States to have the boundary line fixed by a commission to be appointed by the Governors of each State, makes timely and proper this particular proceeding.

It is said in the brief for the defendant:

> "The bill contains no suggestion even that the defendant had taken possession of any territory claimed by plaintiff to belong to her—and no clash of conflicting jurisdiction is averred."

The complete answer to this suggestion is found on page 27 of the defendant's brief to the effect that "the lands claimed by the complainant are either in her own possession or that of W. A. Cissna claiming under" complainant and that the defendant "is prosecuting, in an orderly way, an action to recover the same."

Certainly a "suggestion" of a controversy reposes in the statement that the complainant claims and is in possession of land which the defendant claims and is undertaking to get, without making the complainant a party to the proceeding and in a forum into which the complainant could not be carried.

IV.

It is said in the brief for the State of Tennessee:

> "This decision by the Court of Appeals was made in 1902, and while from its importance as affecting such a matter of great public interest as the boundary line between the States it must have become known at once to the authorities of

> Arkansas, nevertheless she made no denial of its justness nor set up any claim in contravention thereof."

The reference here is to *Stockley v. Cissna*, 119 Fed. 812, and we are in accord with the statement of the learned Attorney General of the State of Tennessee that this is "a matter of great public interest." It is a matter, as we view it, of which this Court should take jurisdiction.

We do not, however, follow the argument of Tennessee's learned Attorney General. It does not readily occur to us how Arkansas could have intervened in an action between individuals which, with the announcement of the decision in the mentioned case, became an ended lawsuit. We do not know to or, really, by whom the State of Arkansas should have denied the "justness" of that decision nor the form the denial should have taken. Nor is it clear to us how Arkansas could have then "set up any claim in contravention" of that decision.

If we understand the argument, it leads to the conclusion that the territorial limits of Arkansas may be reduced and the territorial limits of Tennessee may be enlarged, or, at least, the boundary line between the States left uncertain, because, in an ended lawsuit between individuals, "the authorities of Arkansas" failed to make some sort of denial of something, in some sort of way, or failed to set up some sort of claim to land in her possession.

The mere passivity or silence of the "authorities of Arkansas," where they had no right to be active

and where they could not have been heard, should not be treated as a forfeiture by that State of a vast and valuable territory, nor as defeating the jurisdiction of this Court to settle this controversy between the two States.

The learned Attorney General, elaborating this failure of Arkansas to do something that it could not have done, inquires:

> "Was there any dissent by Arkansas from the principles controlling this decision in State v. Muncie Pulp Co., and Cissna, 119 Tenn. 47-134, or from the location of the boundary line as therein adjudged?"

But for the eminence and very great ability of the Attorney General of the State of Tennessee, we would not devote so much time to the propositions advanced by him in this behalf. We harbor the fear that the force of his proposition is not obvious to us. While affrighted at the vigor of his attack upon the failure of Arkansas to perform or protest with respect to lawsuits in which it was not involved, we confess to an inability to appreciate the point being made.

The possession of not one foot of territory has been disturbed by the various lawsuits as to which the learned Attorney General believes Arkansas should have made some outcry.

It would be interesting to know in what way and where "the authorities of Arkansas" should have made denial of the justice of the claim later made by the State of Tennessee, and what the learned Attor-

ney General means when he states that Arkansas has not heretofore "set up any claim in contravention" of the claim of the State of Tennessee.

The complainant now sets up a claim and makes the present claimant a party. The complainant is now doing that which the State of Tennessee should have done, as we believe, rather than have involved citizens of Arkansas in protracted and expensive litigation in the State Courts of Tennessee, where, whatever the decision, it could not result in fixing the boundary line between Arkansas and Tennessee and any judgment undertaking so to do would be a nullity.

An effort to enforce such a judgment would, we apprehend, involve certain and sure conflict with "the authorities of Arkansas" and the proper forum for the settlement of this question is this Honorable Court.

With the State of Arkansas in possession of the property, certainly the State of Tennessee cannot rely on adverse possession, and if this Court is interested in or concerned with the few years' inactivity of the State of Arkansas with respect to this matter, the reason will readily occur to the Court. The land is in Arkansas and was in possession of citizens of that State. The State of Tennessee was, in its own State Courts, undertaking to get hold of this land and of the value of timber cut therefrom. If Tennessee once got money which represented the proceeds of the timber cut from the land, the Arkansas citizens, thus deprived of their money, could not

recover it. There has never been a time when Tennessee was entitled to believe that in the oppressive litigation which it has carried on against citizens of Arkansas the land could have been recovered because the territory of a sovereign State cannot in this wise be affected. Arkansas vainly indulged the hope, despite discouraging appearances, that the State of Tennessee would cease to harass her citizens with fruitless and futile litigation, and, in a proper proceeding in this Court, have the boundary line settled.

When the Chancery Court of Shelby County, Tennessee, dismissed the suit of the State of Tennessee, brought to get land which was in the possession of a citizen of Arkansas, Tennessee appealed to the Supreme Court of that State and that Honorable Court went beyond the pleadings, it is respectfully submitted, and applied inconsistent and repugnant principles of law to the facts of the case, but rendered no final decree. The cause was remanded that the State of Tennessee might amend its bill, and further proceedings be then had. As these proceedings progressed to the point where it became obvious that the effort of the State of Tennessee to recover these and other lands would result in conflict, the State of Arkansas, for the first time, deemed it expedient and proper to take part in the controversy and it then, in an orderly and lawful way, presented the matter to this Court for its determination.

V.

The suggestion is made in the brief for the State of Tennessee that it is not clear what principle of law complainant claims should be applied to the fixing of the boundary line. We have not gotten to the point where that question requires discussion, but we will state our insistence: The bill shows that the complainant contends that the boundary line between it and Tennessee is "the middle of the main channel" of the Mississippi River as it ran in 1876, immediately preceding the avulsion or cut-off already mentioned.

The Supreme Court of Tennessee, while declaring that an avulsion made no change in the location of said boundary (*119 Tenn. 103*), declared that *the effect of the avulsion* was to make a change in the location of said boundary, (*same case*, 132-133.)

And the said Supreme Court evidently overlooked that in *Stockley v. Cissna*, 119 Tenn. 135, it had declared:

> "The boundary line, therefore, between the States of Arkansas and Tennessee at the *locus in quo* of this controvery is the middle of the old abandoned bed of the Mississippi River *as it existed at the time of the Centennial cut-off.*"

The State of Arkansas insists that the above is a correct exposition of the rights of the parties hereto, and that one of the principles announced in the case of *State of Tennessee v. Muncie Pulp Co. et al., supra*, is correct.

Arkansas denies, however, that an avulsion which "did not alter the boundary line," (as was said in the case of *State v. Muncie Pulp Co.*), and an avulsion which left the boundary line "as it existed at the time" of the avulsion, (as was said in *Stockley v. Cissna, supra*), can have the effect of pressing back the boundary line so as to alter the territorial extent of either State and thus place the boundary between the two States where it did not exist at the time of the avulsion.

In other words, the avulsion could not do two things—it could not leave the line unaffected and at the same time materially affect it.

Arkansas declines to yield assent to the proposition that an avulsion, which left the line at the middle of the river as it ran when the avulsion took place, did not in fact leave it there, but pressed it back to a point where it had been more than fifty years before, and thus deprive the State of Arkansas of valuable territory, from a half mile to a mile in width and over twenty miles in length, i. e., many thousands of acres of fertile fields and splendid forests.

The Supreme Court of Tennessee applied the doctrine of reliction to an avulsion, relying largely on *Mulry v. Norton,* 100 N. Y. 246. In said case the riparian owner had lost his beach by sudden and violent changes and it had been restored to him in the same way, while no such facts existed with respect to the change made in the middle of the Mississippi River. The changes, prior to the avulsion of 1876,

of which Arkansas is entitled to have the benefit, were gradual, insensible and imperceptible shifting by erosions of the Tennessee shore, and accretions to the Arkansas shore, and when the avulsion took place the line was left exactly where it was at that time.

The Tennessee Supreme Court also relied on *Hughes v. Birney's Heirs,* 107 La. 664, though in that case there was but a temporary submergence of land after the river had made a cut-off and in its effort to find a permanent bed.

The Supreme Court of Tennessee relied upon *Harding v. Jordan,* 143 U. S. 382, to sustain the proposition that an avulsion restored the original boundary between the States of Tennessee and Arkansas and undid the effect of the erosions of the Tennessee shore and the accretions to the Arkansas shore, though the Court in *Harding v. Jordan* applied the local law of Illinois in determining whether the title granted to the plaintiff's ancestor went to the water's edge or to the center of the lake. There is nothing in that case which even tends to support the proposition that property lines or rights are affected by an avulsion.

The Tennessee Court also cited *St. Louis v. Rutz,* 138 U. S. 226, though in that case the changes had not been gradual and imperceptible, but "rapid and perceptible."

In other words, the Supreme Court of Tennessee reversed the situation entirely and held that though

changes had been gradually and imperceptibly made, they could be unmade by an avulsion which, as the Court said, had no effect whatever on such changes.

The doctrine of reliction can never be invoked unless the recession of the waters is gradual and imperceptible, rather than sudden and perceptible.

In *Hammond v. Shepard,* 186 Ill. 235, 78 Am. St. Rep. 274, it was said:

> "'Reliction' is the term applied to land made by the recession of the water by which it was previously covered. Warren v. Chambers, 25 Ark. 120, 4 Am. Rep. 23; Banks v. Ogden, 2 Wall. 57. 'If the addition takes place suddenly and sensibly, the ownership remains according to former boundaries; but if it is made gradually and imperceptibly, the derelict or dry land belongs to the riparian owner from whose shore or bank the water has receded.' Woolrich on Law of Waters, 29; Warren v. Chambers, 25 Ark. 120, 4 Am. Rep. 23. All the authorities agree that in order that a shore owner take land by way of accretion or reliction it must appear that the addition was to his shore either by the deposit of earth or by the receding of the water from his land, and that such addition *must be by slow and imperceptible processes.*"

In *Cox v. Arnold,* 129 Mo. 337, 50 Am. St. Rep. 450, it was said of regaining land which had imperceptibly washed away:

> "The only way that plaintiff could have regained what land he had lost by its being washed away, and its *situs* submerged by the waters of

the river, *was by gradual and imperceptible accretion,* beginning at his line at the water's edge."

In *Sapp v. Frazier*, 51 La. Ann. 1718, 72 Am. St. Rep. 493, it was said:

> "Dereliction, as used by the English law, meant when the sea shrank below the usual water mark and remained there. In those cases the law (English) is held to be that, if this be by little and little, it shall go to the owner of the land adjoining. Morgan v. Livingston, 6 Mart. (La.) 244.
>
> * * * * * * *
>
> The reliction must be from the waters in their usual state."

In *Wilson v. Watson*, (Ky., 1911), 138 S. W. 282, Mr. Justice Miller said:

> "'Reliction' differs from 'alluvium' in this: That the former term is applied to land made by the withdrawal of the waters by which it is covered. The withdrawal of the waters must be slow, gradual and imperceptible. The same general rules apply to it as to alluvium. *Murray v. Sermon*, 1 Hawks 56; *Warren v. Chambers*, 25 Ark. 120, 91 Am. Dec. 538, 4 Am. Rep. 23; *Boorman v. Sunnuchs*, 42 Wis. 235."

As reliction is the increase of the land surface caused by the waters gradually receding below the usual water marks, it is unthinkable that the rule with respect thereto could be applied to the sudden recession of the waters, that is, as the result of an avulsion.

It is unnecessary to review the decisions of this Court pertaining to the boundary between States where the middle of the main channel of a navigable river constitutes that boundary. When the change of the river is gradual and imperceptible, by erosion on the one hand or accretion on the other or both, the boundary line follows these gradual and imperceptible changes.

And as the boundary line follows these changes and constitutes the boundary between the States, an avulsion or a cut-off or any sudden and perceptible withdrawal of the waters from between the banks of the river leaves the boundary line exactly where the shifting channel had placed it at the time the waters so suddenly receded.

Missouri v. Kentucky, 11 Wall. 395.
Nebraska v. Iowa, 143 U. S. 359.
Missouri v. Nebraska, 196 U. S. 23.
Missouri v. Nebraska, 197 U. S. 577.

Mr. Justice Lurton stated the law with exact accuracy when, in *Stockley v. Cissna,* 119 Fed. Rep. 812, he said:

> "The middle of the main channel which the river abandoned was the boundary before the formation of the cut-off channel, and that line in the dry and abandoned bed of the river remains the line, unaffected by the new course of the river."

VI.

It is said that the bill in this case does not appear to have been filed or to be prosecuted by authority of the State of Arkansas.

The bill purports to be filed by "the State of Arkansas, by Hal L. Norwood, its Attorney General."

As the Attorney General of the State of Arkansas, it is believed that he has the right, as it is his duty, to institute all necessary actions for the preservation and protection of the rights of the State of Arkansas.

There is nothing on the face of the bill which tends to show that the bill is not properly brought. It is brought in the name of a sovereign State by the officer having in charge the legal affairs of that State.

It is suggested in the brief on behalf of the defendant that if the chief executive officer of the State had signed the bill it might "be presumed to have been filed by the authority of the State." This suggestion was made without the attention of the learned Attorney General of the State of Tennessee having been called to Section 1 of Article VI. of the Constitution of Arkansas, which makes the Attorney General a part of the executive department of that State:

> "The executive department of this State shall consist of a Governor, Secretary of State, Treasurer of State, Auditor of State and Attorney General, all of whom shall keep their offices in person at the seat of government and hold their offices for the term of two years and until their successors are elected and qualified and the General Assembly may provide by law for the establishment of the office of Commissioner of State Lands."

As the executive law officer of the State of Arkansas, under the Constitution of that State, it is believed that this bill was properly filed.

We do not understand, however, that a demurrer is a proper pleading to challenge the authority of an executive officer of a State to institute an action in its name and behalf and for the preservation of its rights and the protection of its citizens.

So far as appears on the face of the bill, we see nothing whatever which justifies the belief that this is an unauthorized proceeding.

VII.

It might be proper to say that we have not, in this discussion, undertaken to deal with the extensive argument of the learned Attorney General of Tennessee that the line, if properly run between Tennessee and Arkansas, would be run in any particular place. We are not concerned with what the learned Attorney General mentions as facts which "show the utter absurdity of Cissna's claim." Mr. Cissna is not a party to this proceeding, has made no claim herein, and the right of one sovereign State to have a controversy with another sovereign State, with respect to a boundary line, settled by the decree of this Honorable Court is not to be determined by whether a man named Cissna, in some other forum, advanced a contention that the learned Attorney General of the State of Tennessee feels called upon to characterize as an "utter absurdity."

We understand the question before the Court to be whether the bill filed by the State of Arkansas against the State of Tennessee states a cause of action under the law and under the Constitution of the United States and that question we have undertaken to present to the consideration of the Court.

The Supreme Court of Tennessee, in a case there pending, has undertaken to fix the boundary line between Tennessee and Arkansas, or, to say the least of it, has announced that its decision in that case will have that effect and the State of Arkansas is no party to that proceeding and cannot be heard therein.

> *State of Tenn. v. Muncie Pulp Co., et. al.,* 119 Tenn. 47, 58, 70.

The learned Attorney General of the State of Tennessee treats that case as establishing "the location of the boundary line."

> Brief for Defendant, pp. 40-41.

The learned Attorney General of the State of Tennessee treats *Stockley v. Cissna,* 119 Fed. 812, as affecting "the boundary line between the States," though Arkansas was no party to that proceeding and had no opportunity to be heard therein.

The Supreme Court of Tennessee has dealt with another and later case involving the question of this same boundary line.

> *Stockley v. Cissna,* 119 Tenn. 135.

In no one of these proceedings could Arkansas have been heard even if she had been willing to enter

a forum other than that provided by the Constitution of the United States for the settlement of this controversy.

And, with profound respect for the learned Attorney General of the State of Tennessee, it does seem but a waste of words to discuss the absence of a controversy over the location of this boundary line, in view of ten years of litigation as well as legislative action by the two States with respect thereto.

Arkansas has instituted this suit in this Honorable Court to put an end to vexatious and profitless litigation, hoping that the controversy as to this boundary line may be settled by the only tribunal on earth that can settle it.

When and only when the boundary line is fixed by this Court will the unpleasant controversy be quieted and the matter put at rest.

Florida v. Georgia, 58 U. S. 478.

Arkansas has not yet had any opportunity to be heard and is not bound by any of the cases mentioned, and her territorial extent cannot be affected thereby.

It is believed that the demurrer of defendant should be overruled and the boundary line between these States definitely settled.

Respectfully submitted,

HAL L. NORWOOD,
Attorney General of Arkansas.

CARUTHERS EWING,
Solicitors for Complainant.

FILE COPY.

Office Supreme Court, U.
FILED
MAR 16 1914
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 1302 Original.

STATE OF ARKANSAS, COMPLAINANT,

vs.

STATE OF TENNESSEE, DEFENDANT.

REPLICATION TO ANSWER.

STATE OF ARKANSAS,

By Attorney General.

HAL L. NORWOOD,

CARUTHERS EWING,

Solicitors for Complainant.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 7, Original.

STATE OF ARKANSAS, COMPLAINANT,

vs.

STATE OF TENNESSEE, DEFENDANT.

REPLICATION TO ANSWER.

Complainant, the State of Arkansas, for her reply to respondent's answer herein, states that it is true, as heretofore alleged in complainant's bill filed in this cause, that the respondent is claiming title to and sovereignty over territory lying within the jurisdiction of complainant at points and places set out in complainant's bill and being those points and places which were affected by the gradual and imperceptible changes in the Mississippi River prior to the avulsion of 1876, as well as the territory of and within the State of Arkansas affected by the avulsion of 1876, otherwise known as the "Centennial Cut-Off."

Complainant, for further reply to respondent's answer herein, states that it is necessary, in order that conflicts of jurisdiction should be avoided between States, that the true boundary line be established and

located and to this end it is asked that this Court enter a decree declaring the principles which shall govern the ascertainment and location of said line and that such orders may be entered herein as are necessary to effect the end to be accomplished.

And by way of further reply to respondent's answer, complainant reaffirms the averments of the bill that between 1823 and 1876 there had been changes in the permanent banks of the Mississippi River and of the course and current thereof, gradually and imperceptibly, and complainant denies the statement of the answer that said river had not shifted gradually and imperceptibly and in such form and manner that in 1876 just prior to the avulsion of that year the boundary between the two States was materially different from said boundary line as it existed in 1823.

And for further reply to respondent's answer herein, complainant denies that the decisions in the cases of *Stockley vs. Cissna*, 119 Fed., 812 and *State of Tennessee vs. Muncie Pulp Co., et al.*, 119 Tenn., 47 are judicial determinations or evidence of the boundary line between the States of Tennessee and Arkansas at the particular places involved in said suits, for the reason that insofar as this complainant is concerned said decisions are ineffectual, as this complainant was no party to those proceedings and was not heard therein.

And for further reply to respondent's answer suggesting that "the boundary line between the Counties of Dyer, Lauderdale and Shelby in the State of Tennessee and the State of Arkansas" should be established in this proceeding, complainant states that the designation of the places as to which it is said the line is in doubt is so vague and indefinite that complainant is unable to ascertain with any degree of certainty the points or places to which attention is sought to be directed and cannot, therefore, say whether there is a controversy between complainant and defendant with respect to the boundary as suggested in paragraph X, page 16 of the defendant's answer filed herein.

STATE OF ARKANSAS,

By Attorney General.

HAL L. NORWOOD,

CARUTHERS EWING,

Solicitors for Complainant.

FILE COPY.

Office Supreme Court, U. S.
FILED
MAR 16 1914
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 12 Original.

STATE OF ARKANSAS, COMPLAINANT,

vs.

STATE OF TENNESSEE, DEFENDANT.

MOTION TO HAVE PRINCIPLES SETTLED FOR THE ASCERTAINMENT OF THE BOUNDARY LINE BETWEEN COMPLAINANT AND DEFENDANT AT THE PLACE MENTIONED IN THE COMPLAINANT'S BILL AND FOR THE APPOINTMENT OF A COMMISSION TO ASCERTAIN AND DESIGNATE AT SAID PLACE THE BOUNDARY LINE BEWEEN THE TWO STATES.

Brief and Argument in Support of the Foregoing Motion.

WILLIAM L. MOOSE,
Attorney General of State of Arkansas.
HAL L. NORWOOD,
CARUTHERS EWING,
Solicitors for Complainant.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 7, Original.

STATE OF ARKANSAS, COMPLAINANT,

vs.

STATE OF TENNESSEE, DEFENDANT.

MOTION TO HAVE PRINCIPLES SETTLED FOR THE ASCERTAINMENT OF THE BOUNDARY LINE BETWEEN COMPLAINANT AND DEFENDANT AT THE PLACE MENTIONED IN THE COMPLAINANT'S BILL AND FOR THE APPOINTMENT OF A COMMISSION TO ASCERTAIN AND DESIGNATE AT SAID PLACE THE BOUNDARY LINE BEWEEN THE TWO STATES.

Now comes the complainant, the State of Arkansas, and without setting this cause for hearing on bill and answer but because of the request of both parties hereto, as contained in the original bill filed by the State of Arkansas and the answer filed by the State of Tennessee, moves the Court:

I.

On the facts alleged in complainant's bill and admitted in defendant's answer, to settle the principles by which the boundary line between complainant and

defendant is to be ascertained at the place mentioned in complainant's bill and more particularly described as the point beginning about Pecan Point in the State of Arkansas and ending at or near Island No. 34, being that territory affected by what is known as the Cut-Off of 1876, or "Centennial Cut-Off."

II.

On the averments of the bill and prayer for relief in that behalf and on the statements in the answer in the nature of a request, that the Court appoint a Commission to ascertain and designate at the place mentioned and described in the bill the boundary line between the two States and that such Commission be required to make the proper examination and to delineate on maps prepared for that purpose the true line according to the principles announced and declared by this Court, so that said boundaray line may be ascertained, determined and properly marked.

III.

And complainant moves the Court for all orders and decrees that may be meet and proper in the premises.

THE STATE OF ARKANSAS.

By Attorney General.

HAL L. NORWOOD,

CARUTHERS EWING,

Solicitors for Complainant.

BRIEF AND ARGUMENT IN SUPPORT OF THE FOREGOING MOTION

INDEX.

Argument 21

Arkansas' Eastern boundary 9

Avulsion, effect of 32

Boundary line discussed 21

Channel made by cut-off 11

Conflict in opinion of Tennessee Court 33

Course of river before cut-off 10

Cut-off described 10

Effect of judgment in other cases 52

Middle of Main Channel--equidistant between banks 22

Preamble to resolution adopted by Tennessee Legislature 58

Propositions of Law 13

Questions to be Settled 8

Recession of the Waters 35

Reliction 36, 47

River of 1823 10

Tennessee's Claim in answer filed 37

Tennessee's Legislative Claim 58

Tennessee's State Decision 33

Tennessee's Western Boundary 9

CASES CITED.

Acts of Tennessee (1903) Chap., 420 58
Angell on Water Courses 17
Boorman vs. Sunnuchs, 42 Wis., 233 18
Bouvier vs. Stricklett, 40 Neb., 793 .....16. 17
Buttenuth vs. St. L. Bridge Co., 123 Ill., 535 15
Carr vs. Moore (Ia.) 93 N. W. R., 52.....18
Cessill vs. State, 40 Ark., 501 59
Christy vs. Scott, 14 How., 282, 292 56
Collins vs. State, 3 Tex. App., 323 17
Cooley vs. Golden, 52 Mo. App., 229 .....15, 17
Coulthard vs. McIntosh, 143 Ia., 389 16
County of Morgan vs. Allen, 103 U. S., 498 53
Cox vs. Arnold, 129 Mo., 337 .....18, 48
Deloney vs. State, 88 Ark., 311 17
Doolan vs. Carr, 125 U. S., 618, 629 56
Dubar vs. Green, 198 U. S., 166 56
Dull vs. Blackman, 169 U. S., 243 54
Farnham on Waters and Water Rights...18, 19, 47, 50
Filhiol vs. Torney, 194 U. S., 356 56
Florida vs. Georgia, 17 How., 478 .....20, 57
Flynn vs. Boston, 153 Mass., 327 15
Foster vs. Wright, 4 L. R. Com. P., 438 .....19, 50
Fowler vs. Lindsey, 3 Dall., 411 52
Fowler vs. Wood, (Kan.) 85 Pac. R., 763 ....15, 16, 17

Fulton vs. New York, 200 N. Y., 411 19
Fussell vs. Gregg, 113 U. S., 550 56
Hagan vs. Campbell (Ala.), 8 Porter 9 19
Hammond vs. Shepard, 186 Ill., 235 ..... 18, 48
Handly's Lessee vs. Anthony, 5 Wheat., 374 .....14, 25
Harding vs. Jordan, 140 U. S., 382 44
Hodges vs Williams, 95 N. C., 331 .....18, 51
Hughes vs. Birney's Heirs, 107 La., 664 43
Humes vs. Scruggs, 94 U. S., 22 54
I. C. R. R. Co. vs. Ill., 146 U. S., 387 19
Iowa vs. Illinois, 147 U. S., 1 .....13, 14, 24
Iowa vs. Illinois, 151 U. S., 238 8
Iowa vs. Illinois, 202 U. S., 59 30
Jones vs. Johnston, 18 How., 150 17
Jones vs. Soulard, 24 How., 41 .....14, 27
Keokuk & H. Bridge Co. vs. Illinois, 175 U. S.,626 ..
....14, 25, 30
Livingston Co. vs. Darlington, 101 U. S., 407 53
Lockhart vs. Johnson, 181 U. S., 516, 529 56
Louisiana vs. Mississippi, 202 U. S., 1 .....14, 30
Lynch vs. Allen (N. C.) 4 Dev. & Bat., 62 16
Maryland vs. West Virginia, 217 U. S., 577 13
Mayor of Carlisle vs. Graham, 4 L. R.(Ex.) 360 19
McBride vs. Steinweden, 72 Kan., 508 15
McCormick vs. Hayes, 159 U. S., 332 56
McGuire vs. Blount, 199 U. S., 142 56
Min. Ass'n. vs. Canfield, 121 U. S., 295 54
Missouri vs. Iowa, 160 U. S., 668 13
Missouri vs. Kansas, 213 U. S., 78 .....14, 15, 16

Missouri vs. Keane, 84 Mo. App., 127 30
Missouri vs. Kentucky, 11 Wall., 395 28
Missouri vs. Nebraska, 196 U. S., 23.....14, 15, 16
Mitchell vs. Bank, 180 U. S., 471 54
Moore vs. McGuire, 205 U. S., 214 .....14, 25
Morgan vs. Reading, 3 Smedes & M., 366 15
Morris vs. Brooke, 25 Alb. L. J., 90 47
Moss vs. Gibbs, 10 Heis., 283 17
Mulry vs. Norton, 29 Hun., 660 .....18, 19, 42, 50
Mulry vs. Norton, 100 N. Y., 246 41
Mut. Ben. Ins. Co. vs. Tisdale, 91 U. S., 238 244 54
Myers vs. Perry, 1 La. Ann., 372 .....15, 16
Naylor vs. Cox, 114 Mo., 232 18
Nebraska vs. Iowa, 143 U. S., 359 .....15, 16
New Orleans vs. Bank, 167 U. S., 371 54
New Orleans vs. U. S., 10 Pet., 917 19
Niehaus vs. Shepherd, 26 Ohio St., 40 16
Nix vs. Pfeifer, 73 Ark., 199 17
Nor. Pac. R. Co. vs. Slaght, 205 U. S., 122 54
Noyes vs. Collins, (Ia.) 26 L. R. A., 609 18
Panker vs. Canter, 62 Kan., 363 17
People vs. Jessup, 160 N. Y., 249 19
Peck vs. State, 137 N. Y., 372 54
Perkins vs. Adams, 132 Mo., 131 18
Pollard's Lessee vs. Hagan, 3 How., 212 19
Railway Co. vs. Ramsey, 53 Ark., 314 .....17, 19
Rees vs. McDaniel, 115 Mo., 145 .....15, 16
Rober vs. Michelson (Neb.) 116 N. W. R., 949 ....15, 16
Sapp vs. Frazier, 51 La. Ann., 1718 .....18, 48

Schools vs. Risley, 10 Wall., 91 28
State vs. Bowen, 149 Wis., 203 16
State vs. Keane, 84 Mo. App., 127 15
State vs. Pulp Co., 119 Tenn., 47.....27, 33, 54
Steele vs. Sanchez, 72 Ia., 65 19
St. Jos. & G. I. R. R. Co. vs. Devereux, 41 Fed., 15 15
St. Louis vs. Rutz, 138 U. S., 226 .....14, 15, 16
Stockley vs. Cissna, 119 Fed., 812 .....35, 46, 55
Stone vs. Towne, 91 U. S., 341 53
Swayze vs. Burke, 12 Pet., 11 56
U. S. vs. Lee, 106 U. S., 196 53
Virginia vs. West Virginia, 11 Wall., 39 57
Vogelsmeier vs. Prendergast, 137 Mo., 271 18
Wallace vs. Driver, 61 Ark., 429 .....16, 17, 49
Warren vs. Chambers, 25 Ark., 120 17
Washington vs. Oregon, 211 U. S., 127 .....14, 30
Washington vs. Oregon, 214 U. S., 205 .....14, 15
Weber vs. Harbor Com., 18 Wall., 57 57
Welles vs. Bailey, 55 Conn., 292 .....18, 49
Whiteside vs. Norton, 205 Fed., 5 .....15, 16
Whitney vs. U. S., 167 U. S., 529 54
Wilson vs. Shiveley, 11 Ore., 215 .....18, 50
Wilson vs. Watson (Ky.) 138 S. W. R., 282 .....18, 49
Woodbury vs. Short, 17 Vt., 387 17

IN THE

SUPREME COURT OF THE UNITED STATES

No. 7, Original.

STATE OF ARKANSAS, COMPLAINANT,

vs.

STATE OF TENNESSEE, DEFENDANT.

BRIEF AND ARGUMENT FOR THE STATE OF ARKANSAS ON MOTION TO HAVE PRINCIPLES SETTLED FOR THE ASCERTAINMENT OF THE BOUNDARY LINE BETWEEN COMPLAINANT AND DEFENDANT AND FOR THE APPOINTMENT OF A COMMISSION TO ASCERTAIN AND DESIGNATE SAID LINE.

STATEMENT OF THE CASE AS PRESENTED BY THE PLEADINGS.

The State of Arkansas, in her original bill (*page* 5) averred that, by avulsion, on March 7th, 1876, the Mississippi River abandoned its then bed at and along the place mentioned in the bill and made for itself a new channel and this averment is admitted by the State of Tennessee to be true.

Answer, page 4.

The State of Arkansas, in her original bill (*page* 5) averred that since Tennessee and Arkansas were ad-

mitted into the Union and prior to 1876, many changes had occurred in the course and current of the river, specifying the more marked and material ones, and this averment, to a limited extent, is admitted by the State of Tennessee to be true (*Answer, page* 6) but it is denied that all of the changes, as averred, had taken place.

The State of Arkansas likewise averred that the "Centennial Cut-Off," i. e., the avulsion of 1876, left the boundary line between the two states exactly as and where it was immediately preceding said avulsion (*page* 6) and this averment may be considered as a statement of a legal proposition rather than of fact. However, the State of Tennessee admits the averment but, insists that "when the waters disappeared therefrom (because of the avulsion) the lands formerly submerged and covered by the river belonged, wherever the lands could be identified, to the original owners."

Answer, page 6.

The State of Arkansas insists, by her bill, that the line between the two States is "the center of the main channel" of the Mississippi River as it flowed just before the avulsion, (*page* 7), whereas, the State of Tennessee insists that the line between the two States is a line equidistant between the banks of the river, without regard to the location of the main channel of the said river.

Answer, page 9.

Therefore, on the pleadings, this court can determine the principles to govern the location or running of the line and leave to the Commission to be appointed the ascertainment of said line, in accordance with the decree of the Court.

Both States concede the necessity for the ascertainment and location or delineation of said line and ask that a Commission be appointed.

Original bill, page 10.
Answer, pages 16-17.

The settlement of the principles, to control the running of the line will materially affect the extent and nature of the proof to be offered, in that, if the insistences of the State of Arkansas are sustained, the location of the line is a simple matter, whereas, if the insistences of the State of Tennessee are sustained much proof will be required with respect to accretions or the lack thereof, and all of this evidence may be immaterial according as this Court holds one way or the other.

These considerations impel the State of Arkansas to invoke, by motion, the settling of the principles to control the location of the line, and to have a Commission appointed to run the line in harmony with the rules announced and directions given by this Court. This simplifies the proceeding and reduces to a large extent the cost and expense thereof, and eliminates the necessity for taking a vast amount of proof, which, when taken, may be wholly immaterial.

And the State of Arkansas, by making this motion, expressly disclaims a purpose to set this case for hearing on bill and answer, in the knowledge that with respect to so important a matter as the settling of the territorial limits of two sovereign States, the Court will proceed with circumspection and deliberation, rather than hold the parties to any technical rules of practice.

Iowa vs. Illinois, 151 U. S., 238.

There is no evidence which could affect the determination of the following questions that are raised by the two states and the settlement of which, one way or the other, makes comparatively easy the location of the true boundary line:

1. Is the boundary line to be run along the center of the main channel of the Mississippi River as it flowed in 1876, just preceding the "Centennial Cut-Off" (as Arkansas contends), or is it to be so run as to follow a line equidistant between the well defined banks of the stream, irrespective of the location of the main channel (as Tennessee contends)?

2. Did the territorial limits of the States follow the gradual and imperceptible changes made in the course and current of the river, prior to the "Centennial Cut-Off"?

3. Did the Centennial Cut-Off", i. e., the avulsion of 1876, so alter or affect those territorial limits

that the boundary line, as it existed in 1876, was, by the avulsion, pressed back to where it was before the line had been changed by the gradual and imperceptible shiftings of the river?

On examination of the deed of February 25th, 1790, by which North Carolina ceded to the United States that territory which subsequently became the State of Tennessee, it will be found that the western boundary of that territory was described as "*the middle of the Mississippi River.*"

Vol. 1, *American State Papers, Public Land, page* 17.

The western boundary of the State of Tennessee is thus defined by the Legislature of that State:

"The western boundary of the State of Tennessee is *the middle of the stream of the Mississippi River*, including within the State of Tennessee all of such islands as are held under grants from the States of Tennessee and North Carolina."

Code of Tennessee, Shannon, Art. 80.

The State of Arkansas was admitted into the Union on June 23rd, 1836, and the Eastern boundary of said State was declared to be "*the middle of the main channel of the Mississippi River.*"

5 *U. S. Stat. at Large*, 50-51.

In the Arkansas Constitution of 1836, Art. 1, the Eastern boundary of the State was described as *"the middle of the main channel of the Mississippi River."*

While Tennessee was admitted into the Union in 1796, and Arkansas was admitted into the Union in 1836, the court will find in the answer a reference to the river as it run in 1823, and a like reference in an opinion of the Supreme Court of Tennessee (*State vs. Muncie Pulp Co.*, 119 *Tenn.*, 47) and it might be well to explain that the reference to that year (1823) is because of the fact that in 1823 the western territory, that is, the lands lying on the Arkansas side of the river were sectionized and from this sectionizing in that year and from corresponding land lines and marks on the Tennessee shore in that year, the location of the river in 1823 has been made, or at least an attempt has been made to locate the river as it run in that year, but whether it has been correctly located is a matter for the Commission to be appointed, in the event that the Court finds that it is at all material where the river run at that time.

By taking the original bill, the court can readily trace the Cut-Off. Examining the map opposite page 4 of the bill and commencing at the top thereof, it will be found that in 1874 when the reconnoissance was made from which said map was reproduced (being two years before the Cut-Off), the river passed Pecan Point, Ar-

kansas, to the east of that point and flowed practically due south to the southeast corner of Dean's Island, Arkansas, when the river, slightly curving, flowed to the west until it reached the east side of what is marked on the map as "Huddleston 2000 acres" and then flowed in a northwesterly direction, passing immediately south of Island 37, following a westerly course to a point south of "Cottonwood Point". It is proper here to say that in 1823, and doubtless when Arkansas was admitted into the Union, the river did not flow south of Island 37, but at that time flowed to the east and north and west thereof. The channel, as appears on that map, south of Island No. 37, was at that time known as "McKenzie's Chute" and was somewhat differently located, but it appears in red lines on the map. When the river reached "Cottonwood Point", it continued practically south to a point on the map marked "Pacific" and then run a short distance to the east through what is marked on the map and was known as "Devil's Elbow." It then run due north to "Brandywine Bar," thence circled to the east around "Brandywine Bar" and at Bateman Bayou took a southerly course.

In 1876 the river made for itself a new channel known as "Centennial Cut-Off" at a point about, or possibly a little east of Island 36 and west of the tract in red, "Huddleston 2000 acres", washing away the intervening lands and cutting through the place marked "Massey." This resulted in the waters being withdrawn

from old McKenzie's Chute, which had, as above stated, been shifted, as shown on the map, between 1823 and 1876, and likewise caused a withdrawal of the waters from the river bed east, north and west of Island 37 and likewise caused a withdrawal of the waters from the river bed as it run around "Devil's Elbow."

The precise question before the court, therefore, relates to the line between the two States commencing at a point near Island 36 on the Tennessee shore and following the abandoned bed of the river and the sinuosities of the river to a point near "Brandywine Bar."

On the map exhibited with the bill there will be found the land and river lines of 1823 marked in red, which, when compared with the Humphrey map, exhibited with the answer, will show the changes made between 1823 and 1876 in land lines and the location and run of the river. It will be seen that McKenzie's Chute had shifted immediately southwest of Dean's Island, considerably to the north at the southeast corner of Island 37, while it had shifted to the south at the southwest corner of said Island.

The parties hereto agree, as indicated by the bill and answer, that the changes made from 1823 to 1876 were gradual and imperceptible and that the Cut-Off in 1876, whereby the bed of the river was altered, was an avulsion.

The three questions above stated as the matters for determination at this time can, with this explanation, be readily understood by the Court.

PROPOSITIONS OF LAW.

I.

As the original bill and answer request the appointment of a Commission to ascertain and designate the boundary line between the two States, this Court will comply with that request.

Iowa vs. Illinois, 147 U. S., 1.
Missouri vs. Iowa, 160 U. S., 668.

II.

The Commission will be clothed with authority "to adopt all ordinary and legitimate methods in the ascertainment of the true location of said boundary line, including the taking of evidence under oath and calling for papers and documents," preserving and certifying to this Court such evidence, etc.

Maryland vs. West Virginia, 217 U. S., 577, 583.

III.

There is no repugnancy between the boundaries of the two States, as later shown, and it is conceded that if there be a repugnancy between "the middle of the Miss-

issippi River" (Tennessee's western boundary line) and "the middle of the main channel of the Mississippi River" (Arkansas' eastern boundary line), then the former must control, as Congress was, in 1836, when Arkansas was admitted into the Union, without power to change the territorial limits of Tennessee as fixed in 1796.

Louisiana vs. Mississippi, 202, U. S. 1, 40.

IV.

"The middle of the Mississippi River", (description of Tennessee's western boundary line) and "the middle of the main channel of the Mississippi River" (description of Arkansas' eastern boundary line) mean the same thing, to-wit, the *Thalweg*, the channel of navigation, the deep water channel.

Handly's Lessee vs. Anthony, 5 *Wheat.*, 374.
Jones vs. Soulard, 24 *How.*, 41.
St. Louis vs. Rutz, 138 *U. S.*, 226, 249.
Iowa vs. Illinois, 147 U. S., 1, 8.
Keokuk & Hamilton Bridge Co., vs Illinois, 175 U. S., 626, 631.
Missouri vs. Nebraska, 196 U. S., 23.
Louisiana vs. Mississippi, 202 U. S., 1, 49.
Moore vs. McGuire, 205, U. S., 214.
Washington vs. Oregon, 211 U. S., 127, 134.
Missouri vs. Kansas, 213 U. S., 78.
Washington vs. Oregon, 214 U. S., 205.

St. Joseph & G. I. R. R. Co., vs. Devereux, 41 *Fed.* 14.

Buttenuth vs. St. L. Bridge Co., 123, Ill., 535.

State vs. Keane, 84 Mo., App., 127.

Morgan vs. Reading, 3 *Smedes* & M. 366.

Myers vs. Perry, 1 La. Ann., 372.

Flynn vs. Boston, 153 Mass., 327.

Whiteside vs. Norton, 205 Fed. 5.

McBride vs. Steinweden, 72 Kan., 508.

Cooley vs. Golden, 52 Mo. App., 229.

V.

The boundary line between Arkansas and Tennessee continued to be the middle of the main or deep water channel of the Mississippi River, though it shifted and moved by reason of accretions to one shore or erosions from the other. In other words, though this line gradually and imperceptibly shifted, it remained the boundary line between the two states.

St. Louis vs. Rutz, 138 U. S., 245.

Nebraska vs. Iowa, 143 U. S., 359.

Missouri vs. Nebraska, 196 U. S., 23.

Missouri vs. Kansas, 213 U. S., 78.

Washington vs. Oregon, 214 U. S., 205.

Rees vs. McDaniel, 115 Mo., 145.

Rober vs. Michelson, (Neb.) 116 N. W. R., 949.

Fowler vs. Wood, (Kan.) 85 Pac. R. 763; 6 L. R. A., (N. S.) 162.

Nichaus vs. Shepherd, 26 Ohio St., 40.

Coulthard vs. McIntosh (Ia.), 122 N. W., 233.

Wallace vs. Driver, 61 Ark., 429; 31 L. R. A. 317.

Whiteside vs. Norton, 205 Fed. 5.

State vs. Bowen, 149 Wis., 203, 39 L. R. A., (N. S.), 200.

McBride vs. Steinweden, 72 Kan., 508.

VI.

When the Cut-Off occurred in 1876, and the Mississippi River abandoned the old and made for itself a new bed, the boundary line remained in the middle of the abandoned or deserted river bed.

St. Louis vs. Rutz, 138 U. S., 226, 245.

Nebraska vs. Iowa, 143 U. S., 359.

Missouri vs. Kansas, 213 U. S., 78.

Missouri vs. Nebraska, 196 U. S., 23.

Rees vs. McDaniel, 115 Mo., 145.

Rober vs. Michelson (Neb.), 116 N. W. R., 949.

Fowler vs. Wood (Kan.), 85 Pac., 763, 6 L. R. A (N. S.), 162.

Lynch vs. Allen (N. C.), 4 Dev. & Bat., 62.

Coulthard vs. McIntosh, 143 Ia., 389, 122 N. W. R., 233.

Bouvier vs. Stricklett, 40 Neb., 793.

State vs. Bowen, 149 Wis., 203, 39 L. R. A. (N. S.), 200.

DeLoney vs. State, 88 Ark., 311.

Nix vs. Pfeifer, 73 Ark., 199.

Wallace vs. Driver, 61 Ark., 429.

Railway Co. vs. Ramsey, 53 Ark., 314.

Moss vs. Gibbs, 57 Tenn. (10 Heisk.), 283.

Cooley vs. Golden, 52 Mo. App., 229.

Angell on Water Courses, (97th ed.), Art. 57.

VII.

When the avulsion of 1876 occurred, land, which had been theretofore submerged by the gradual encroachments of the river and had become the river bed, was not restored to the original proprietor on the retirement of the river, because the recession of the water was sudden and visible, not gradual and imperceptible. The doctrine of reliction only applies when land is uncovered gradually and imperceptibly.

Jones vs. Johnston, 18 How., 150, 156.

St. Louis vs. Rutz, 138 U. S., 226.

Warren vs. Chambers, 25 Ark., 120, 91 Am. Dec., 538.

Fowler vs. Wood (Kan.), 85 Pac., 763; 6 L. R. A. (N. S.), 162.

Collins vs. State, 3 Tex. App., 323.

Woodbury vs. Short, 17 Vt., 387.

Bouvier vs. Stricklett, 40 Neb., 793.

Pauker vs. Canter, 62 Kan., 363.

Hammond vs. Shepard, 186 Ill., 235.

Vogelsmeier vs. Prendergast, 137 Mo., 271.

Wallace vs. Driver, 61 Ark., 429; 31 L. R. A., 317.

Noyes vs. Collins (Ia.), 26 L. R. A., 609.

Cox vs. Arnold, 129 Mo., 337.

Sapp vs. Frazier, 51 La. Ann., 1718.

Perkins vs. Adams, 132 Mo., 131.

Naylor vs. Cox, 114 Mo., 232, 243.

Boorman vs. Sunnuchs, 42 Wis., 233, 245.

Carr vs. Moore (Ia.), 93 N. W., 52.

Hodges vs. Williams, 95 N. C., 331; 59 Am. R., 242.

Wilson vs. Watson (Ky.), 138 S. W., 283.

Farnham on Waters and Water Rights, Vol. 1, p. 320; Vol. 3, p. 2490.

VIII.

When a river gradually encroaches on the shore the title of the original owner is lost and the State or sovereign acquires the title to so much of the land as becomes the bed of the river.

Welles vs. Bailey, 55 Conn., 292, 317.

Wilson vs. Shirtley, 11 Ore., 215.

Mulry vs. Norton (N. Y.), 29 Hun., 660.

Hodges vs. Williams, 95 N. C., 331; 59 A. M. R., 242.

Railway vs. Ramsey, 53 Ark., 314.

Steele vs .Sanchez, 72 Ia., 65.

Foster vs. Wright, L. R. Com. Pleas Div., Vol. 4, p. 438, 446.

Mayor of Carlisle vs. Graham, Court of Exchequer, 4 L. R., 360.

Farnham on Water and Water Rights, Vol. 1, p. 332.

IX.

The title to the bed of a navigable river is in the State, except where the river suddenly abandons its regular channel and makes a new one. In the latter event, the title of the owner of the suddenly submerged land remains unaffected and, if the river ever leaves his land, he is entitled to assert his right thereto.

New Orleans vs. United States, 10 Pet., 917.

Pollard, Lessee, vs. Hagan, 3 How., 212.

Weber vs. Harbor Commissioners, 18 *Wall.*, 57

I. C. R. R. vs. Illinois, 146 U. S., 387, 435.

Fulton, etc., Co. vs. New York, 200 N. Y., 411.

People, ex rel. vs. Jessup, 160 N. Y., 249, 256.

Mulry vs. Norton, 29 Hun., 660.

Hagan vs. Campbell (Ala.), 8 Porter 9; 33 Am. Dec., 267.

Mayor of Carlisle vs. Graham, Court of Exchequer, 4 L. R., 360.

(In the last cited case will be found a lucid statement of the rights of the owner of land suddenly covered by the waters of a river.)

X.

This court is not concerned with titles, but simply fixes the boundary lines between the States, and claimants of land may, at their pleasure, assert their rights in a proper forum. The boundary line, as declared by this court, must be accepted by all the world.

Florida vs Georgia, 58 U. S., 478.

ARGUMENT.

With respect to the *first* and *second propositions* of law advanced above, we have only to say that they relate to matters of procedure or practice. It seems idle for the parties to take extensive proof with respect to land and river lines as they existed in any one year or the other, when such proof, under the law, may be wholly immaterial, and for that reason we have assumed on this hearing that the court will fix the principles to control the location of the boundary lines to the end that the proof, if any is required, may be addressed to material matters.

With respect to the *third proposition* of law above stated, the concession made by the State of Arkansas as to the absence of power in Congress in the year 1836 to alter the boundary line of Tennessee as theretofore fixed, to-wit: in 1796, eliminates that question from the field of debate.

The *fourth proposition* of law advanced by the State of Arkansas is that the boundary line between the two States is the middle of the navigable or deep water channel of the Mississippi River rather than a line drawn at or along a place equidistant between the well defined banks of the River.

If we are correct in believing that there is no repugnancy between the Acts admitting Tennessee and Arkansas into the Union and that the true boundary between the States is "the middle of the main channel of the Mississippi River," shall the line be run along "the middle of the main channel" or at a place which would represent a line equidistant between the banks, without regard to the main channel?

By running the line along the middle of the main channel no injustice could or would be done either State. For instance, the main channel of the river was against or next the Tennessee bank to the east, south and west of Dean's Island, as will appear from the map exhibited with complaintant's bill, and as will also appear from the map exhibited with defendant's answer. The sharp curve of the river, as it runs south, on the east side o' Dean's Island, and about the said Island, running north on the west side of said Island, indicates that the main channel of the River "hugged" the Tennessee shore as it went around Dean's Island. Yet, as the river run north and to the east of Island No. 37, it "hugged" the Arkansas shore, and thus what Tennessee vould lose at one point, it would gain at another. However, it is unimportant that one State would lose or the other gain by running the line along the center of the main channel of the river, so far as the legal principle is concerned.

To run the line along the center of the main channel, that is, the channel of commerce, is the only feasible and practicable way to run the line. If the line were to be run midway between the well defined banks of the river, the result would be that when running the line where islands were encountered a part of an island would be in one State and a part in another State. There are no islands in the main or navigable channel of the river. An island is on one side or the other of the main channel. An island is, therefore, in one State or the other. If the line is run as the State of Tennessee says it should be run, it could only be so run where no islands were encountered, and where islands were encountered, there would have to be a sudden and irregular shift so as to pass on one side or the other of such islands. Certainly, between the well defined banks of the river there are many islands. These islands may or may not be entirely on one side of a line run equidistant between the well defined banks. If entirely on one side of such line, no difficulty would be encountered. If not entirely on one side of such line, the manner of running the line would have to be altered so as to follow the main channel of the river and leave the island, as it should be left, within one State or the other, or the line would have to cross the island, leaving part of it in one State and part in another. The difficulties in the way of and the confusion that would follow running the

line midway between banks as they relate to dealing with islands, must readily occur to the Court.

Islands are regarded as appendages to either bank.

Iowa vs. Illinois, 147 U. S., 1, 9.

And it is plain that Congress intended that islands in the river should lie wholly in one State or in the other. As the middle of the main channel must flow on one side or the other of an island, the language of this court in *St. Louis vs. Rutz*, 138 U. S., 226, 249, is peculiarly apt:

"It follows that an island in the Mississippi River in its course between Illinois and Missouri must lie wholly in one of those States or the other, because the main channel of the river must run on one side or the other of such islands."

If Arkansas is in error in her insistence that the boundary line follows the main or navigable channel of the river, then Island No. 37 was partially within the State of Arkansas and partially within the State of Tennessee, for in 1823 McKenzie's Chute was a part of the river, though at that time not the main channel. It was a part of the river, however, and the waters of the river flowed on both sides of that island, yet it has never been contended that Island No. 37, or any part of it, was in Arkansas. It has always been recognized and treated as being in Tennessee, and it could only be

in Tennessee on the idea that the boundary line followed the main or navigable channel of the river.

Independent of the embarrassment that would attend an effort to run the line midway between well defined banks in the matter of placing islands as they should be placed—wholly within the jurisdiction of the one State or the other—it is insisted that a correct interpretation of the Acts admitting the two States into the Union requires that the line be run along the center of the main channel of the river and that by "main channel" is meant the channel of navigation,—*the deep water channel.*

Handlys' Lessee vs. Anthony, 5 Wheat., 374.
Iowa vs. Illinois, 147 U. S., 1.
Missouri vs. Nebraska, 196 U. S., 23.
Louisiana vs. Mississippi, 202 U. S., 1, 49.
Moore vs. McGuire, 205 U. S., 214.
Washington vs. Oregon, 211 U. S., 127.
Washington vs. Oregon, 214 U. S., 205.

The tortuous course of the Mississippi River, producing on one side thereof a sloping bank, on which sand bars form, throwing the main channel or channel of navigation along the other bank, makes it essential, if each State is to have preserved to it an interest in the navigation of the river, that the line be run as in-

sisted by the State of Arkansas, or as was well said by Mr. Justice Field, in *Iowa vs. Illinois, supra:*

"When a navigable river constitutes the boundary between two independent States, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each State in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It is, therefore, laid down in all the recognized treatises on international law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining States up to which each State will on its side exercise jurisdiction. In international law, therefore, and by the usage of European nations, the term 'middle of the stream,' as applied to a navigable river, is the same as the middle of the channel of such stream, and in that sense the terms are used in the treaty of peace between Great Britain, France and Spain, concluded at Paris in 1763. By the language, 'a line drawn along the middle of the river Mississippi from its source to the river Iberville,' as there used, is meant along the middle of the channel of the river Mississippi."

Or as Mr. Chief Justice Fuller said in *Louisiana vs. Mississippi, supra*:

"The term '*thalweg*' is commonly used by writers on international laws in definition of water boundaries between States, meaning the middle or deepest or most navigable channel. And, while often styled 'fairway' or 'midway' or 'main channel' the word itself has been taken over into various languages. Thus in the treaty of Luneville, February 9, 1801, we find '*le Thalweg de l'Adige*,' '*le Thalweg du Rhin*,' and it is similarly used in English treaties and decisions, and the books of publicists in every tongue."

And in the case from which the above quotation is taken, *Iowa vs. Illinois, supra*, is approved.

As already stated, in *Iowa vs. Illinois*, 147 U. S., 1, it was held that "when a navigable river constitutes the boundary line between two independent States, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream." It was also held in said case that the terms "middle of the Mississippi River" and "middle of the main channel of the Mississippi River" and "the centre of the main channel of that river" were synonymous.

This holding we believe to be correct though the Supreme Court of Tennessee said of that case in *State vs. Pulp Co.*, 119 Tenn., 47, at page 88:

"This case is in direct conflict with the previous cases of *Missouri vs. Kentucky*, *St. Louis vs. Rutz*, *Jones vs. Soulard*, *St. Louis Public Schools vs. Risley*, and *Nebraska vs. Iowa*, cited above, which involved practically the same question, and the first four construed the same treaties and Acts of Congress. They are not differentiated, overruled or even referred to in the case of *Iowa vs. Illinois*. We are better satisfied with the reasoning of these cases than we are with that of the last one, and prefer to follow them."

Our effort will be (1) to show that *Iowa vs. Illinois* is not in conflict with the cases mentioned and (2) that said case has been followed and approved by this Court and is to be treated as settled law.

Jones vs. Soulard, 24 How., 41, the earliest of the cited cases, decided in 1860, involved the question whether a grant of land, bounded by a fresh water river,

where the expressions designating the water line are general, conferred proprietorship "to the middle thread of the stream." The calls for boundary in the charter of St. Louis were "to the Mississippi; from thence by the Mississippi," and the argument was that these calls limited the boundary to the bank of the channel, rather than carried same "to the middle thread of the Mississippi River." The Court declined to sustain this insistence.

The Schools vs. Risley, 10 Wall., 91, the next of the cases, decided in 1869, involved the question whether a street or tow path, for the public use, existed between a certain parcel of land and the river, when St. Louis was founded and laid out, as determining whether the owner of said lot was a riparian owner. It was essentially a question of fact.

Missouri vs. Kentucky, 11 Wall., 395, (decided in 1870), was a suit to ascertain and establish the line between the two States at a point on the Mississippi River, known as Wolf Island. The location of the main channel of the river, whether east of the island, when the boundary between the States was fixed, was the subject of investigation. We can find nothing in the case repugnant to the principles announced in *Iowa vs. Illinois*.

St. Louis vs. Rutz, 138 U. S., 226, involved the question whether the land in dispute was "a part of

surveys 149 to 156 inclusive, in the common field of Prairie du Pont, with the accretion thereto" or whether it was an accretion to, and part of, an island called "Arsenal" or "Quarantine Island." The Court, declining to review findings of fact, decided (1) that whether the title of a riparian proprietor went "to the middle thread of the stream or only to the waters' edge" was governed by the law of the State, (2) that if the bed of a stream changes imperceptibly; etc., the line of the land bordering on it changes with it, (3) that if the change is by reason of a freshet and occurs suddenly, the line remains as it was originally, and (4) that the middle of the main channel of the Mississippi River was the line between Illinois and Missouri.

Nebraska vs. Iowa, 143 U. S., 359, announced the well settled rule that when a boundary stream changes and shifts gradually and imprecceptibly the line follows such changes but when the stream suddenly abandons its bed and seeks a new course, the line remains in the abandoned channel; and that these principles applied to the Missouri river.

So that, as we interpret them, no one of the cases said by the Supreme Court of Tennessee to be in conflict with *Iowa vs. Illinois* is repugnant thereto.

And the rule announced in *Iowa vs. Illinois* has been repeatedly declared by this Court to be the correct